license to serve the public interest. They are allowed free use of a valuable and limited resource -- the spectrum -- to run commercial enterprises and to make a profit. In return, they are expected to serve their communities by providing free broadcast signals and by fulfilling certain public interest obligations. Retransmission consent would turn the Communications Act of 1934 on its head by essentially granting broadcasters, and not the public, ownership of the airwaves, and giving them the power to determine who can receive their signals for free and who has to pay for them.

Furthermore, altering the regulatory structure under which cable systems are guaranteed the ability to retransmit broadcast signals by providing broadcasters or copyright owners the right to veto such carriage is toying with chaos. While some may speculate that elimination of the compulsory license and/or imposition of retransmission consent will create a second revenue stream for broadcasters, no one can truly predict what will happen if the existing scheme is disrupted. And since the compulsory license facilitates the transmission of broadcast signals to increased audiences, it is certainly not obvious why its repeal would somehow benefit broadcast stations. Indeed, it is ironic that the FCC seeks comments on this issue in the context of a report that examines the future of broadcasting, because increasing the barriers to cable carriage potentially could contribute to broadcasters' "irreversible long-term decline

in audience and revenue share"[33/] predicted by OPP.

### A. The Compulsory License Continues to Serve The Important Purpose of Promoting the Availability of Broadcast Signals

When Congress adopted the cable compulsory license in 1976 it "struck what is found to be a fair balance between the rights of copyright owners and copyright users in order to advance the paramount rights of the viewing public."[34/] As the United States Supreme Court observed in 1984:

> In devising this system, Congress has clearly sought to further the important public purposes framed in the Copyright Clause, U.S. Const. Art. I. Section 8, of rewarding the creators of copyrighted works and of "promoting broad public availability of literature, music and the other arts." . . . Compulsory licensing not only protects the commercial value of copyrighted works but also enhances the ability of cable systems to retransmit such programs carried on distant broadcast signals, thereby allowing the public to benefit by the wider dissemination of works carried on television broadcast signals.[35/]

The viewing public has continued to be well served by the operation of the compulsory license. Viewers located in areas with limited local broadcast coverage have been able to obtain access to a full complement of network, educational and independent stations; viewers nationwide have enjoyed improved reception of

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33/ OPP Report at 159.

34/ Report and Order in Docket Nos. 20908 and 21284, 79 F.C.C.2d 652, 805 (1980).

35/ Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 710-11 (1984) (citations omitted, emphasis supplied).

local broadcast signals and increased diversity in program offerings.

The compulsory license also provides a benefit to local stations. Cable operators provide a valuable service to broadcasters by improving and extending reception of their over-the-air signals -- a service that broadcasters can readily convert into increased advertising revenues.[36/] This is particularly true since cable operators essentially perform a "passive" retransmission function with respect to these signals: under the terms of the compulsory license, they may not alter the content of, or alter, delete or substitute advertising contained in, any programs carried on broadcast signals.[37/] Under these

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36/ See OPP Report at 17 (noting that "industry observers believe that the growth of cable made possible the expansion in the number of broadcast television stations by increasing the potential audience of UHF stations."); Cable Television Service (Competition and Rate Deregulation Policies), 67 R.R.2d at 1806 ("[c]able carriage of broadcast signals improves a station's reach and reception quality and thus increases broadcast stations' audiences."); Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 379 n.20 (D.C. Cir. 1982) ("Cable retransmission therefore enlarges a television station's audience and increases the value of station advertising . . . .")

37/ 17 U.S.C. Section 111(c)(3). Moreover, to the extent the Commission is concerned about competition to local stations from distant signals imported by cable systems pursuant to the compulsory license, see OPP Report at 156, it is difficult to discern the public interest justification in denying viewers access to different program offerings that they desire to watch. In any event, as described above, cable systems do not derive a dual revenue stream from carrying these distant stations. Repeal of the compulsory

(Footnote continues on next page)

circumstances, we fail to see how the compulsory license injures the competitive position of local broadcasters.

B. The Compulsory License Remains An Important Mechanism for Avoiding Significant Transaction Costs.

A second reason for adoption of the compulsory license mechanism was Congress' conclusion in 1976 that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."[38/] There is no evidence that these transaction costs would be any different today. If anything, the significant rise both in the number of broadcast stations and cable systems since 1976 suggests that these problems may well be more difficult to overcome.

In the absence of compulsory licensing, the nearly 10,000 cable systems in the United States would remain faced with the difficult burden of negotiating for the rights to carry every

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(Footnote continued)

license -- and substitution of cable network for distant signals -- may well result in increased competition to local stations for local advertising dollars rather than an improved competitive position for broadcasters.

38/ H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 8-9 (1976).

program shown on every station carried on the system.[39/] The fundamental nature of the particular problems associated with obtaining rights to simultaneously retransmit copyrighted works that led to adoption of the compulsory license remain the same. Each station carried by a cable system is the licensee of copyrighted works from numerous program suppliers, and may itself be the copyright owner of other programs such as local news. In addition to securing the necessary consents from the appropriate copyright licensee in the ownership chain, cable systems still would be faced with the problem of anticipating in advance what programs would be broadcast and at what time, and maintaining the necessary personnel and equipment to black out programs for which clearances could not be obtained. In light of the multitude of parties on both sides of the bargaining table, no bargaining efficiencies have been identified sufficient to overcome the transactional problems manifested in a conventional copyright scheme. Instead, imposing additional, significant transaction costs on carriage by cable of broadcast signals may well deter

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39/ While the Commission previously has speculated that transaction costs may no longer be significant since the emergence of cable MSOs enables many systems to spread costs over a "larger subscriber and total revenue base than was the case in 1976," Compulsory Copyright License for Cable Retransmission, 4 F.C.C.Rcd. at 6570, the fact remains that each cable system, regardless of whether it is affiliated with an MSO, carries a different lineup of local signals, and perhaps distant signals as well. Therefore, it would not necessarily be more efficient for an MSO to bargain over retransmission rights, and the difficulties in acquiring rights would still remain present.

the carriage of many local stations, particularly new stations and stations directed to narrow audience segments.

### C. The Commission Should Not Repeat its Failed Experiment With Retransmission Consent

The Commission has also raised the issue of whether imposition of a further impediment to cable carriage of broadcast signals in the form of retransmission consent would improve local broadcaster's competitive position. While giving broadcasters the unilateral right to pick the pockets of cable subscribers and operators nationwide in theory would provide a boost to any industry in such a position, this boost would come at the expense of program diversity.

Retransmission consent clearly constitutes an effort by the broadcast networks, in particular, to develop a new revenue stream -- in this case from cable companies and their subscribers -- to complement their advertising revenues. However, this scheme also has a more subtle objective -- to redirect revenues cable operators receive from their subscribers away from cable networks, and to the broadcast networks. CBS President Laurence Tisch has admitted in Congressional testimony that one consequence of retransmission consent would be that cable operators would be forced to "reapportion" their programming

expenditures from cable program services to broadcasters.[40/] And an internal CBS document proclaims that:

> cable operators are paying inflated fees . . . to cable programmers and spending it on exotic 'niche' channels that do not win sufficient viewing to justify a fee. If a cable operator were faced with a payment for the local affiliates vs. a payment for, say, the Weather Channel, chances are that the operator would choose the affiliates or pay less for the Weather Channel.[41/]

Imposition of retransmission consent thus represents a conscious political objective to strengthen the broadcast networks at the expense of cable networks, their competitors. The result for consumers would be a loss of the many new and diverse program offerings made possible by cable operator investment in cable programming networks.[42/]

Furthermore, adding a layer of retransmission consent on top of the existing compulsory licensing scheme simply makes no sense. The Commission has already understood retransmission

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40/ Testimony of Laurence A. Tisch, President and CEO, CBS, Inc. Before the House of Representatives, Committee on Energy and Commerce, Subcommittee on Telecommunications and Finance, on H.R. 1303: The Cable Television Consumer Protection and Competition Act of 1991 (June 27, 1991) at 53 ("it may be necessary for the cable operator to reapportion his program costs, how much does he pay to CNN or ESP[N] or USA or some of the local so-called niche channels . . . .")

41/ Questions and Answers About Retransmission Consent at 2.

42/ See Cable Television Service (Competition and Rate Deregulation Policies), 67 R.R.2d at 1776 ("[t]he cable industry has launched numerous new programming services and original programs. Indeed the number of cable programming services has doubled since the Cable Act. The cable industry has tripled annual spending on programming [since the Cable Act] . . .")

consent to be a "copyright surrogate" that is "patently inconsistent with the Congressional intent [in adopting the cable compulsory license] because it would 'skew' the balance of interests carefully and explicitly struck by the Congress."[43/] The Court of Appeals in upholding the Commission's decision in Malrite T.V. of New York v. FCC similarly concluded:

> Retransmission concerts would undermine compulsory licensing because they would function no differently from full copyright liability, which Congress expressly rejected. Under the NTIA proposal cable operators would be forced to negotiate individually with numerous broadcasters and would not be granted retransmission rights, a scenario Congress considered unworkable when opting for the compulsory licensing arrangement . . . . A rule imposing a retransmission consent requirement would also directly alter the statutory royalty formula by precipitating an increase in the level of payments of cable operators to obtain consent for program use. Such a rule would be inconsistent with the legislative scheme for both the specific compensatory formula and the appropriate forum for its adjustment.[44/]

And, more recently, the Associate Register of Copyrights for Legal Affairs explained that

> the retransmission consent provisions [of pending legislation] alter the fundamental principle of the compulsory licensing scheme: signal availability. The license provides cable operators with the right

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43/ Report and Order in Docket 20988 and 21284, 79 F.C.C.2d 663, 790-91 (1980). For that reason, the Commission concluded that it lacked jurisdiction to adopt NTIA's retransmission consent proposal. Id. We do not understand the Commission's NOI to suggest a different resolution of this fundamental jurisdictional issue.

44/ 652 F.2d 1140, 1148 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

> of retransmission upon payment of the statutory royalty fee. Although Congress was sensitive to the rules and regulations of the FCC, it certainly did not envision in 1976 that cable operators would be required to obtain additional retransmission rights outside of the license, either from broadcasters or copyright owners.[45/]

Retransmission consent necessarily conflicts with the policy of encouraging the wider distribution of broadcast signals at a statutorily determined fee.

In addition, it is fundamentally inconsistent with the notion that broadcasters are provided free access to the airwaves to provide service to the public. The essence of "broadcasting" is the provider's intent that it be received by the "indiscriminate public."[46/] Retransmission consent essentially confers on broadcasters a means of asserting ownership over those airwaves in order to deny access to a particular segment of that public -- cable subscribers -- located in their local service area.

Given the right to deny access, loss of broadcast signals inevitably will occur. The Commission's prior experimentation

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45/ Statement of Dorothy Schrader, Associate Register of Copyrights for Legal Affairs, Before the Subcommittee on Intellectual Property and Judicial Administration, House Committee on the Judiciary, 102nd Congress, First Sess. at 19 (July 10, 1991).

46/ Subscription Video, 62 R.R.2d 389, 398 (1987), aff'd, Nat'l Ass'n for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988).

with retransmission consent in the 1960's[47/] -- before the imposition of any copyright liability on cable systems for retransmitting broadcast signals -- proved to be a failure, as broadcasters either could not or would not grant the necessary consents.[48/] We have seen no evidence that this situation would be any different today. And if a local broadcaster is unable to obtain necessary clearances to grant retransmission consent, or places too high a price on the consent,[49/] or simply refuses to grant consent, cable systems will have no choice but to drop that station's signal.[50/] There are no good public policy reasons to risk a repeat of this failure, thereby jeopardizing the cable viewing audience's access to broadcast signals.

Finally, even if in theory there might be some value to a totally free market approach -- a free market without must carry or retransmission consent rules, or the compulsory license -- this untested departure from the historical method for retransmitting broadcast signals raises many difficult issues.

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47/ Notice of Proposed Rulemaking in Docket 18397, 15 F.C.C.2d 417 (1968).

48/ See Cable Television Report and Order, 36 F.C.C.2d 143, 150-54 (1972).

49/ The OPP Report cites a CBS estimate that retransmission fees would reach $72 to $160 million annually for the network and its affiliates. OPP Report at 157 n.209. Total retransmission consent fees may exceed $3 billion annually.

50/ And, moreover, operation of the Commission's network non-duplication and syndicated exclusivity rules may deprive cable viewers entirely of access to programs they desire.

For example, who would or could obtain the copyright rights to authorize cable retransmission of programming aired by the broadcast station, and how would cable operators, program suppliers and broadcasters avoid the transaction costs associated with a non-compulsory license regime? The current controversy between broadcasters and program suppliers over pending retransmission consent legislation suggests that a simple solution should not be assumed. Broadcasters -- particularly regional broadcasters -- may not be able to obtain the rights to authorize cable retransmission even if they desired to be carried by a cable system. Cable operators may find it in their interest to negotiate with the copyright owners directly to carry programming and avoid altogether a broadcaster acting as a middleman. Further, what effect would elimination of the compulsory license or imposition of retransmission consent have on weaker broadcast stations? Those stations with limited audience appeal in a new environment may well lose easy access to cable and to the improved reception it provides.

These are only a few of the unknowns raised by any proposed change to the way that cable gains access to broadcast signals. But they demonstrate that creation of a second revenue stream for broadcasters or an improvement in their competitive position is hardly the necessary outcome of any such change. The difficult issues implicated by imposition of requirements for obtaining consent to cable retransmission of broadcast signals were debated for more than a decade prior to adoption of the compulsory license in 1976. Proponents of change bear a heavy burden to

demonstrate that a fundamental revision to this system is necessary or that any new mechanism ultimately will provide a better service to the public than that currently in place.

## CONCLUSION

Over the past fifteen years, broadcasting's role in the video marketplace has undergone significant changes, and it is appropriate that the Commission take another look at regulatory policies and rules that were adopted when broadcasting was virtually the only medium. As we have shown, for example, the network-cable crossownership rule may no longer serve any valid regulatory purpose. The rule prohibiting local broadcast stations from owning cable systems in their service areas may, on the other hand, still play a useful role in ensuring diversity and preventing anticompetitive conduct in local communities. And the compulsory license continues to serve the public interest by facilitating the provision of broadcast programming to cable subscribers.

In any event, while the Commission should eliminate regulatory burdens that serve no purpose but to impair the ability of broadcasters to compete in the video marketplace, it should not use the current competitive problems of the industry as a premise to give special advantages to broadcasters or to load up obligations on its competitors. Such protectionism is wholly unwarranted, given the health and viability of the broadcast industry and the fact that broadcasters no longer

serve a unique function as providers of public service programming and other requirements.

Respectfully submitted,

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